No. 88-1715

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

BOBROW GREENAPPLE & SKOLNIK,
a Partnership Including a Professional Corporation,
Respondent,

—v.—

GERALDINE WOODS and ROBERT WOODS,
Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. WHERE A DEFENDANT AGAINST WHOM A DEFAULT JUDGMENT HAS BEEN ENTERED SEEKS TO REOPEN THE DEFAULT SO THAT DEFENDANT CAN ASSERT A DEFENSE WHICH, IF TIMELY ASSERTED WOULD HAVE RAISED AN ISSUE OF FACT REQUIRING A TRIAL, MAY THE DISTRICT COURT IN THE EXERCISE OF ITS DISCRETION PURSUANT TO FRCP 55, REFUSE TO VACATE THE DEFAULT ON THE GROUND THAT IT WAS WILLFUL?

THE SECOND CIRCUIT ANSWERED THIS QUESTION: YES.

RESPONDENT CONTENDS THE ANSWER IS: YES.

2. IS THE DISTRICT COURT'S EXERCISE OF DISCRETION IN DENYING PETITIONERS THE OPPORTUNITY TO ASSERT A DEFENSE WHICH WOULD HAVE RAISED A TRIABLE ISSUE OF FACT IF TIMELY ASSERTED, A DEPARTURE FROM THE USUAL COURSE OF JUDICIAL PROCEEDINGS?

THE SECOND CIRCUIT ANSWERED THIS QUESTION: NO.

RESPONDENT CONTENDS THE ANSWER IS: NO.

3. IS THERE ANY BASIS FOR EXERCISE OF CERTIORARI JURISDICTION BY THE SUPREME COURT OF THE UNITED STATES?

THE CIRCUIT COURT DID NOT ADDRESS THIS QUESTION.

RESPONDENT CONTENDS THE ANSWER IS: NO.

REASON FOR DENYING CERTIORARI

NO REVIEW BY THIS COURT IS APPROPRIATE WITH RESPECT TO THE DEFAULT JUDGMENT IN THIS CASE. THE SECOND CIRCUIT COURT OF APPEALS EMPLOYED WELL ESTABLISHED PRINCIPLES OF LAW IN AFFIRMING THE DISTRICT COURT'S REFUSAL TO SET ASIDE THE ENTRY OF PETITIONERS' DEFAULT ON THE GROUND THAT IT WAS WILLFUL.

District Judge Walker of the United States District Court for the Southern District of New York carefully considered multiple affidavits and other documents filed by Petitioners between September of 1987 and February of 1988 in which Petitioners, seeking to vacate a default judgment and have an opportunity to defend an action for recovery of legal fees, asserted that their failure to respond to a complaint, notice of attachment, notice of motion and letters advising of an adjourned return date personally requested by Petitioners was excusable, and that if given an opportunity they would assert a meritorious defense. Judge Walker found

that the defense described by Petitioners (but not proved by them) was meritorious but nevertheless refused to reopen the default because he also found that their default was willful.

In their petition for certiorari to this Court as well as in their appeal to the Second Circuit Court of Appeals, Petitioners have fixed their attention upon Judge Walker's finding that the defense they proposed to assert was a meritorious one and have made the unfounded leap of logic that the mere assertion of it is the proof of it. They also assume that they have proved that Respondent law firm engaged in "fraudulent or sham invocation of diversity jurisdiction" (Petition page 15) asserted a "false quantum meruit claim" (Petition page 1) and perpetrated a "fraud on the Court." (Petition page 20). There is no basis in the record for these scurrilous charges.

Indeed, as Respondent argued in the Second Circuit, had it the need and the opportunity to counter the defense, it would have demonstrated conclusively that unlike the plaintiffs in the case of Finkelstein v. Kins, 124 A.D.2d 92, 511 N.Y.S.2d 285 (1st Dept. 1987) upon which Petitioners rely, its services were not completed. Petitioners had requested that Respondent obtain for them the right to assert a claim against the individual principals of Donald Sheldon & Co., Inc. and Donald Sheldon Government Securities Inc. and, as demonstrated by the settlement on the record at the Bankruptcy Court Respondent had uniquely succeeded in doing that. No other claimant in the bankruptcy proceeding had accomplished the reservation of right to pursue a claim against those individual principals. Respondent was prepared to pursue that claim when Petitioners discharged the law

firm by failing to pay its bills. Respondent was therefore not limited by New York law to the amount of its retainer agreement but had the right to seek recovery in quantum meruit.

The Petition is totally lacking in merit. It assumes that Judge Walker found that the Respondent law firm had perpetrated a fraud upon the court and despite that finding refused to reopen a default judgment in favor of the law firm. Such a refusal would indeed be a departure from the usual course of judicial proceedings. However, no such finding was made. The only finding made was that the proposed defense, if asserted, had sufficient merit to raise a triable issue of fact. The proposed defense, although found to be meritorious for purposes of a motion to vacate a default judgment, must still be proved at trial to defeat Respondent's claim for recovery of the value of

services rendered. Keegel, et. al., v. Key West & Caribbean Trading Company, Inc., et. al., 627 F.2d 372 (2d Cir. 1980). Nevertheless, no trial was ordered because Petitioners had willfully defaulted and had forfeited their right to a trial.

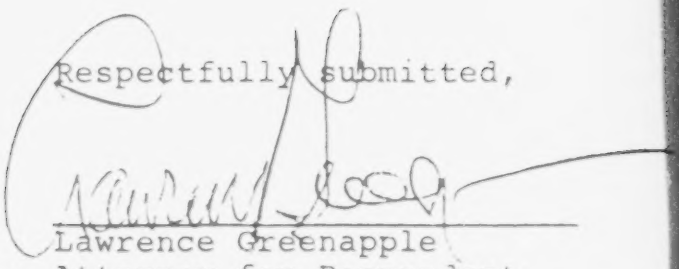
That proposition is one about which the District Courts, the Circuit Courts of Appeal, and this Court are in complete agreement. There are no contrary holdings. Nor should there be any.

CONCLUSION

The Court of Appeals properly affirmed the order of the District Court which denied Petitioners' motion for relief from a default judgment based upon a finding that the Petitioners' default was willful. No abuse of discretion was found. There is no basis in fact or law for granting Certiorari.

Dated: New York, NY
May 22, 1989

Respectfully submitted,



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